DOCKET NO. FA 02- 0079128 S

KATHERINE MYERS

V.

PAUL BARSELAU

SUPERIOR COURT

J.D. OF TOLLAND
AT ROCKVILLE

FAMILY SUPPORT
MAGISTRATE DIVISION

DECEMBER 18, 2006

MEMORANDUM OF DECISION
(Motion for Modification, no. 108, dated March 7, 2006
re: Educational Support Orders)

I.
BACKGROUND

This action was commenced by a Paternity Petition (dated July 3, 2002) brought by the State of Connecticut on behalf of Katherine Myers (hereinafter referred to as the Petitioner) and against Paul Barselau (hereinafter referred to as the Respondent) regarding the child, Benjamin Myers, born to the Petitioner on January 20, 1987.

A Judgment of Paternity was entered by the court (Lifshitz, FSM) on November 26, 2002, based in part on positive genetic test results. The Respondent was represented by private counsel. A current child support order of $128.80 per week plus $25.76 per week on the arrearages was entered, in accordance with the Connecticut Child Support Guidelines. The court found an arrearage

to the Petitioner in the amount of $19395 and an arrearage to the State of Connecticut in the amount of $3273 for the three years immediately preceding the filing of the Paternity Petition, per General Statutes Section 46b-172.

The court also reserved jurisdiction with respect to an educational support order in accordance with General Statutes Section 46b-56c, which statute had become effective on October 1, 2002.

The parties were never married to each other. The Paternity Petition was not brought until Benjamin was 15 years old. Apparently the Respondent did not know the child existed until this paternity action was brought. No reason for these circumstances was provided at this hearing or contained in the Transcript of the November 26, 2002 paternity hearing. The Respondent has not had any direct contact with the mother or child since that hearing date.

Subsequently, the Petitioner filed the subject pro se Motion for Modification dated March 7, 2006. The motion claims a change of circumstances in that "Benjamin will be attending college in the Fall of 2006", and requests "contribution from Paul Barselau for college expenses". Thereafter counsel appeared for both parties. The motion was referred to the Family Support Magistrate division by the family court (Swords, J.) for a hearing. This court, with the apparent acquiescence of the parties, treats the subject Motion to Modify as a Motion for an Educational Support Order pursuant to Section 46b-56c.

The parties stipulated at the hearing that: the current child support ordered was terminated, as Benjamin had reached majority age and graduated from high school; the child support arrearage balance due to the Petitioner was $12985.68 as of as of July 24, 2006; and the Respondent would increases the payment on the arrearage to $75 per week.

The Petitioner offered testimony to confirm that Benjamin was entering the University of Connecticut (at Storrs) as a full time freshman student for the Fall 2006 semester. She testified that Benjamin attended a parochial high school for 3 years and college preparatory school for 2 years, the former apparently paid by the Petitioner, and the latter paid in part by financial aid in part by the Petitioner. The Petitioner provided evidence that the annual total cost for room, board and related fees is approximately $17500 for the 2006-2007 school year, but that academic scholarships, grants and about $2700 in available loans (if utilized) will reduce the out-of-pocket costs to about $4,700.

Subsection (c) of Section 46b-56c states:

"The court may not enter an educational support order pursuant to this section unless the court finds *as a matter of fact that it is more likely than not that* the parents would have provided support to the child for higher education or private occupational school if the family were intact." *After making such a finding*, the court, in determining whether to enter an educational support order, shall consider all relevant circumstances, including: (1)The parents' income, assets and other obligations, including obligations to other dependents; (2) the child's need for support to attend an institution of higher education or private occupational school considering the child's assets and the child's ability to earn income; (3) the availability of financial aid from other sources, including grants and loans; (4) the reasonableness of the higher education to be funded considering the child's academic record and the financial resources available; (5) the child's preparation for, aptitude for and commitment to higher education; and (6) evidence, if any, of the institution of higher education or private occupational school the child would attend." (Emphasis added.)

The Respondent objects to an educational support order being entered against him in the present case. He argues that given the existing facts, circumstances and testimony provided, the Petitioner has failed to prove and, therefore, the court cannot find that the foregoing statutory test has been met. The Respondent further argues that because this threshold test has not been met, the court has no need to consider evidence of "relevant circumstances" set forth in Section 46b-56c (c), (such as the financially ability of the parties, and the child's academic abilities, preparation, aptitude, or commitment), and thus the motion should be denied.

The Respondent does not dispute that Benjamin has the requisite academic record, preparation for, aptitude for and commitment to higher education. The Respondent argues in support of his objection that because he never had any contact with the mother or child in this case, there never could have been any joint discussion or consideration of college education. He testified that he has enjoyed financial and career success without college education, having graduated from a technical high school and becoming employed as a State of Connecticut Department of Corrections Officer, and does not agree that college is necessary for a child to succeed.

The Petitioner's argument may be paraphrased as follows: The court should find that the threshold test has been met because the mother's unilateral decision that the child should attend college, along with the Respondent's financial ability to assist with college, the Petitioner's limited financial ability and the child's academic abilities all combine to cause one to conclude that if the

parties were intact, the father would be contributing to college expenses.

Further, Respondent's counsel appended to his brief extensive "legislative history" documents and transcripts (including his own comments as a state representative) regarding the purported intent of Section 46b-56c. Counsel for the Petitioner responded that the court should not consider such extra-textual evidence because the statutory language is plain and unambiguous.

II

DISCUSSION

There is very little precedent in Connecticut case law regarding the issue of educational support orders where the parties were never married. It appears that all Appellate Court decisions rendered in Connecticut since October 1, 2002 (the effect date of Section 46b-56c) regarding education support orders (either per the statute post - October 1, 2002, or by purported agreements entered between the parties prior Oct. 1, 2002) deal exclusively with dissolution of marriage cases. See *Sander v. Sander,* 96 Conn. App. 102, 899 A. 2d. 670 (2006); *Racsko v. Racsko*, 91 Conn. App. 315, 881 A. 2d. 460 (2005); *Kelman v. Kelman*, 86 Conn. App. 120 (2004), cert. denied, 273 Conn. 911 (2005; *Robinson v. Robinson*, 86 Conn. App. 719, 862 A. 2d. 326, (2004).

There have been numerous Superior Court decisions on this subject, reported and unreported, virtually all involving married parties. Perhaps the only written (unreported) decision to date regarding unmarried parents is *Watters v. Mase*, judicial district of Fairfield at Bridgeport, Docket No. FA 04-4003940 2005 (August 12, 2005) (Ct. Sup. 11953). It will be discussed below.

The court in *Sander,* supra, 116-118, ruled that the language of Section 46b-56c (c) is clear and unambiguous. Therefore this court does not need to look at the extra-textual evidence offered by the Respondent as to the meaning of the statute. The language and meaning are clear. However, the court did review the legislative material provided in an attempt to find some guidance regarding factors to use to apply the "more likely than not" test where the parties were never married, never intact, or (in the extreme case as here) where the father was unaware the child existed. Unfortunately, virtually all discussions referred to married parties. Thus, the statute as worded makes it more difficult for a court to determine ...as a matter of fact that it is more likely than not that the parents would have provided support to the child for higher education... when the parents were never intact as a family, and perhaps more difficult still in a situation as the present case (as compared to an intact family situation, married or otherwise).

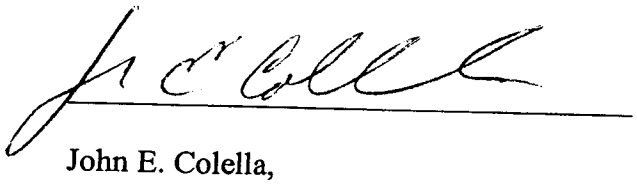
Therefore the court must look to a manifestation of intent on a case-by case basis to decide whether the threshold test has been met. Clear indicia of intent, as found in numerous decisions at the Appellate and trial court level, include testimony and/or written evidence of explicit agreements between the parties, family assets set aside or designated specifically for future college expenses, and the fact that both parents are college educated.

The Petitioner cites *Watters*, Id, as precedent for her position. The respondent in *Watters* was served with a paternity petition one day prior to the child's 18th birthday. Judge Wolven found the (more likely than not) threshold test was met because the petitioner demonstrated a willingness to contribute to her son's college expenses, and because "The defendant has a college fund for which

he contributes for his nine-year old daughter; accordingly there is sufficient inference that the same would have occurred for his son."

However, *Watters*, Id. is distinguishable from the present case, as this court cannot find any similar independent manifestation of intent by the Respondent. Also, there has been no communication between the parties as to any aspect of the child's life. Therefore, upon review of the court file, transcript of the November 26, 2002 court hearing, the relevant statutes and case law, the legislative history, testimony and argument provided, and considering the unique facts and circumstances of this case, the court (unfortunately) is unable to find as a matter of fact that it is more likely than not that the parents would have provided support to the child for higher education. Thus, the court does not need to consider the "relevant circumstances" necessary to establish an educational support order.

Accordingly, the Motion to Modify is denied.



John E. Colella,
Family Support Magistrate